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SIPDIS

SENSITIVE

USTR FOR SAUMS
COMMERCE FOR 4520/ITA/MAC/ONE/COBERG
TREASURY FOR MILLS, CHANG

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SUBJECT: JORDAN STALLS ON BIT

REF: 01/28/03 SVAT/ROGERS TELCON

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¶1. (SBU) SUMMARY: FM Muasher told the Ambassador that he wants a three month delay in the Exchange of Instruments of Ratification that would bring the Bilateral Investment Treaty (BIT) into force in order to allow the government time to assess the Treaty's impact on a pending investment dispute with an Italian firm. Further delay in the Exchange will send a bad message to investors at a critical time for Jordan, particularly given the role FDI could play in mitigating the long-term economic impact of a military conflict with Iraq. Following up on his discussions in Jordan in October, we recommend U/S Larson raise this concern with the Jordanian Trade and Foreign Ministers. END SUMMARY

NOW YOU SEE IT; NOW YOU DON'T

¶2. (SBU) In a meeting with the Ambassador January 19, FM Muasher said Jordan would like a three month delay in the Exchange of Instruments of Ratification that would bring the BIT into force. Muasher said MFA and outside lawyers advised him to postpone the Exchange pending resolution of an International Center for Settlement of Investment Disputes (ICSID) case brought against Jordan by two Italian companies due to fears that the companies could take advantage of Most Favored Nation (MFN) status under the Jordan-Italy BIT once the U.S. BIT enters into force. Muasher suggested that Jordanian and U.S. lawyers get together to resolve the question of the U.S. BIT's applicability.

¶3. (SBU) MFA Legal Affairs Director Naber called Econoff February 20 to elaborate on the reasons for the Minister's delay. He said the counsel for the GOJ, Imam Odeh of the Sheif Ali Zoubi law firm, sent a letter to Minister of Water and Irrigation (MWI) Nasser suggesting that he request, via the MFA, a three month delay in the entry into force of the BIT. He suggested that this could enhance the Ministry's legal position regarding an ICSID complaint filed by the two Italian companies against the MWI. Odeh argued that the delay was desirable because the companies were currently submitting the facts of the case to ICSID under the Italian BIT, which permits ICSID intervention only as a method of last resort. He said he was concerned that an entry into force of the American BIT at this time would enable them to use MFN status to more readily access the ICSID mechanism via the American BIT. Once the facts of the case are presented, the case is "locked", according to Odeh, and the companies would be unable to invoke the American BIT.

¶4. (SBU) Naber was at pains to stress that this was not an open-ended matter, and that the MFA fully expected the issue to be resolved soon and the entry into force to proceed. He said, "It is not our intention to delay putting into place the last big piece of the jigsaw we have put together," but added that "for a small economy like ours, \$28 million (the amount claimed by the Italians) is a lot of money." Naber added that he and other MFA advisors met with Odeh to "see if there might be another way" and avoid this problem, but could find none. He said that he, and Odeh, were open to discussing their concerns with lawyers from the Department.

THE ITALIAN CONNECTION

¶5. (SBU) The dispute with the MWI was brought to ICSID by Italian construction companies Salini Construtorri and Italstrade against the Jordanian government in November, 2002 under the terms of the Jordan-Italy BIT. However, in a discussion with Italian Embassy Econoff Nicola Lener, we learned the Italian companies plan to use most favored nation treatment accorded to it by the Italian BIT to gain access to the ICSID mechanism once our BIT is in force. (ICSID is a measure of last resort in the Italian BIT, but available to investors at any point under the U.S. treaty.) Lener confirmed that the company is strictly Italian, with no

American connection or investors. He said the complaint centers on cost overruns allegedly incurred by the companies in the construction of the Karameh dam project in the mid-90s for which they have not been reimbursed.

¶16. (SBU) Naber had brought the Italian case to our attention in mid-January, upon receiving our diplomatic note proposing minor technical changes to the Jordanian-Arabic text of the BIT (changes that were agreed to by both parties in direct discussions in December in Washington). Post then consulted with L and EB (REFTELCON) and were advised that BIT provisions only apply after entry into force, thirty days after the Exchange of Instruments of Ratification. We passed this information along to Naber late January, who expressed appreciation, and assured us an MFA response to the Dip Note would soon be forthcoming and that we could soon proceed on setting up a ceremony for the Exchange. As recently as February 17, a Jordan Investment Board (JIB) official told us she was expecting the draft copy of the response to our Dip Note from the MFA.

COMMENT

¶17. (SBU) We expect that regime change in Iraq will considerably improve Jordan's attractiveness as a destination for foreign investment. The combination of greater regional stability and the preferential access Jordan enjoys to the U.S. and European markets would put Jordan in a unique position to stand out in the region as an FDI recipient. Indeed, an increase in FDI flows could well be an important factor in helping Jordan adjust over time to the loss of its special oil relationship with Iraq and otherwise offset the negative economic impact on Jordan of a military conflict.

¶18. (SBU) Given the role FDI could play, the idea that Jordan would not allow an investment treaty to enter into force because there is a chance its provisions might actually be used in a particular case is shortsighted. In addition to a BIT being an important asset in attracting foreign investment, potential foreign investors are likely to look especially poorly on legalistic maneuvers like the one proposed by Muasher in order to avoid obligations to investors. (In fact, the GOJ has already argued that a case brought to ICSID by the U.S.-U.K. company Jacobs Engineering under the UK BIT is not valid because the UK BIT was not properly ratified. This assertion was quickly disproved by the UK embassy.) Furthermore, we note that an investment chapter was not included in the U.S.-Jordan FTA on the expectation that the BIT would provide sufficient protections.

¶10. (SBU) Post will vigorously pursue this issue with Muasher and senior ministers responsible for economic matters. Even though the question of the BIT's applicability to the Italian case should not bear on the GOJ's policy making, we would also be happy to facilitate contacts between USG and Jordanian lawyers if the Department thinks it would be useful. In addition, we think it could be helpful for U/S Larson to include this issue in his discussions with Jordanian officials on the impact on Jordan of a conflict. Letters from U/S Larson to Muasher and to Industry and Trade Minister Salah al-Bashir along the lines of the text suggested below would reinforce the high-level USG economic interest in seeing this treaty in force without further delay.

¶11. (SBU) Begin text of proposed draft letter.

Dear Mr. Minister:

A theme of my meetings with you and other Jordanian officials and the business sector in Amman last October was the economic potential Jordan enjoys given its outstanding record of economic reform and the preferential access it enjoys to the U.S., EU and other markets. Jordan's attractiveness as a destination for foreign direct investment will be a key ingredient of its capacity to mitigate the economic impact of disruptions in the region and to achieve its full economic potential.

Because of the central role foreign direct investment plays in economic growth and development, I am concerned that the United States and Jordan have not been able to bring into force the Bilateral Investment Treaty that was signed in 1997 and ratified by the Jordanian Parliament in 1998 and the U.S. Senate in 2000. Since U.S. and foreign investors look to the assurances provided by such treaties when making investment decisions, I hope that we can bring this agreement into effect without further delay. I understand that once a few technical adjustments have been made to the Arabic text, Ambassador Gnehm is prepared to exchange instruments of ratification with Jordan's designated official.

I look forward to hearing from you about this important issue. With this key complement to our Free Trade Agreement in place, I believe that we will have created a legal

structure that will allow the economic relationship between
the United States and Jordan to continue to grow and flourish.

End Text

GNEHM